IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.5868 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE M.R. SHAH Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PRAGNA CO-OP. HOUSING SOCIETY LTD

Versus

MUNICIPAL COMMISSIONER

Appearance:

1. Special Civil Application No. 5868 of 2004

MR PM THAKKAR with MR MANAV A MEHTA for Petitioner No. 1-2

MR MAULIN R RAVAL for Respondent Nos.1-2

NONE APPEARS for Respondent No. 3-4

MR AC GANDHI for Respondent Nos.5-10

CORAM : HON'BLE MR.JUSTICE M.R. SHAH

Date of decision: 18/08/2004

CAV JUDGEMENT

RULE. Mr.Maulin Raval, learned advocate, appears and waives service of rule on behalf of the respondent

Nos.1 and 2 and Mr.A.C.Gandhi, learned advocate, appears and waives service of rule on behalf of respondent Nos.5 to 10. Though served none appears on behalf of respondent Nos.3 and 4.

2. In this petition Pragna Co-op. Housing Society Limited and its Secretary, the petitioners herein, have prayed for an appropriate writ, direction or order for quashing and setting aside the plan sanctioned by the Ahmedabad Municipal Corporation (AMC) submitted by respondent Nos.5 to 10 for the purpose of construction of hospital and also prayed for setting aside the Commencement Certificate No.05061/270104/RO/MOO issued by the Ahmedabad Municipal Corporation on 06-04-2004.

3. The brief facts of the present petition are that the petitioner No.1 - Society had purchased 1104 sq. mtrs. of land out of the plot admeasuring 2130 sq. mtrs. leaving 1026 sq. mtrs. to the original owners. Thus, the petitioner No.1 - Society is in the land admeasuring 1104 sq. mtrs. Out of the remaining plot of land admeasuring 1026 sq. mtrs. 850 sq. mtrs. of land was purchased by respondent Nos.5 to 10 from its original owners. It is the case of the respondent Nos.5 to 10 that before purchasing the said land a public notice was published in the local Gujarati Daily 'Sandesh' dated 20-06-2003. No objections were filed against the said public notice either by the petitioners or by anyone else. Thereafter they have purchased the plot in question. It is also the case of respondent Nos.5 to 10 that the land in question which is purchased by them is an independent plot and is not connected in anyway with the petitioner No.1 - Society.

3.1 The petitioners had filed a Civil Suit No.2494 of 2003 in the Court of learned City Civil Court, Ahmedabad against respondent Nos.5 to 10 initially for a declaration and permanent injunction restraining them from putting up construction for the purpose other than the residential house and also for a declaration that the respondents may not get the development permission sanctioned without prior permission of the petitioners and also prayed for permanent injunction. That said suit came to be filed in the month of September 2003. It seems that thereafter another suit was filed being Civil Suit No.2686 of 2003 and by way of amendment in Civil Suit No.2686 of 2003, it is prayed for a declaration and permanent injunction restraining the respondent Nos.5 to 10 herein for getting the plan sanctioned for the purpose other than the residential purpose and restraining the

AMC from giving any building permission. By way of amendment it is also prayed for a declaration and permanent injunction restraining the respondent Nos.4 to 10 herein (original defendants) from getting the plans sanctioned as the same are likely to affect the easementary rights of the members of the Society. A Notice of Motion was moved in the said Civil Suit No.2494 of 2003 and notice was issued to the defendants on 23-09-2003 and was made returnable on 07-10-2003 and in the meanwhile ad-interim relief in terms of para 13 came to be granted with the clarification that the residential premises can be constructed till then.

3.2 It seems that in the said suit Notice of Motion at Exhs.6 and 7 came to be filed by the petitioners. In the meantime, respondent Nos.5 to 10 submitted the plans for the purpose of putting up construction in the plot in question but the same was not processed by the AMC in view of the pendency of the Notice of Motion Exhs.6 and 7 and a grievance was made before the learned City Civil Court at Ahmedabad that because of pendency of the suit and one another Civil Suit No.2494 of 2003 the AMC has not processed the plan submitted for its sanction in accordance with the provisions of the B.P.M.C. Act and, therefore, the learned Chamber Judge, Court No.10, City Civil Court at Ahmedabad by order dated 16-12-2003, below Notice of Motion at Exhs.6 and 7 in Civil Suit No.2687 of 2003, passed the following order :-

" During the course of hearing, the defendants Nos.3 to 5 have made grievance before this Court that because of pendency of the present suit and one other suit No.2494/03 filed by Pragya Co.op.Housing Society, defendants Nos.1 and 2 are not processing the plan submitted for its sanction in accordance with provisions of B.P.M.C. Act. So at this stage, it requires to be clarified and also some direction is required to be issued to defendants Nos.1 and 2 to the effect that defendants Nos.1 and 2 shall take up process of plan as per the provisions of B.P.M.C. Act and rules and regulations made thereunder without being influenced by pendency of aforesaid both the suits and injunction order passed in C.S.No.2494/03 and after hearing the parties as required under the provisions of B.P.M.C. Act and rules and regulations made thereunder."

3.2 Thereafter the plans submitted by respondent Nos.5 to 10 came to be considered by the AMC. By virtue of the order dated 16-12-2003, passed below Exhs.6 and 7

in Civil Suit No.2687 of 2003, the AMC sanctioned the plans submitted by respondent Nos.5 to 10 for the purpose of construction of hospital on 06-04-2004. Thereafter the Notice of Motion filed in Civil Suit No.2494 of 2003 came to be heard by the learned Chamber Judge, Court No.13, City Civil Court at Ahmedabad and after hearing the petitioners as well as the respondents, passed the following order on 22-04-2004 :-

" The defendants are hereby permitted to make construction in the suit premises as per the plans sanctioned by the Corporation, but they shall not demolish the wall situated on the eastern side of the suit plot. The proposed construction will be subject to the outcome of the proceedings that may be made by the plaintiff either to challenge the permission before the Corporation or before the Hon'ble High Court, as stated by the l.a. for the plaintiff."

3.3 During the course of hearing of the Notice of Motion the original plaintiffs stated that they want to challenge the development permission granted by the AMC. However, instead of making any amendment in the Civil Suit No.2494 of 2003 and/or in Civil Suit No.2687 of 2003 the present petitioners have preferred the present petition on 06-05-2004 challenging sanction of the plan as well as the development permission/commencement certificate issued by the AMC allowing respondent Nos.5 to 10 to put up the construction of the hospital.

4. The present petition came up for hearing before this Court on 07-05-2004. A grievance was made on behalf of the petitioners that the AMC was directed to consider the plans after hearing the parties as required under the provisions of the BPMC Act and the Rules and Regulations made thereunder, in spite of the aforesaid directions given by the Civil Court they were neither heard by the authorities nor the objections filed by them were considered and, therefore, they have challenged the validity of the commencement certificate granted on 06-04-2004. Considering the aforesaid grievance while issuing notice this Court passed the following order :-

".... Respondent No.1 is directed to state whether the petitioners were heard or whether objections filed by them were considered before commencement certificate dated 06-04-2004 was issued in respect of the land in question. If the petitioners were not heard or their objections had not been considered by respondent

No.1, respondent No.1 may restrain respondent No.5 to 10 from putting up construction on the land in question in spite of the commencement certificate dated 06-04-2004 issued by respondent No.1."

Notice was made returnable on 18-04-2004.

5. In response to the notice issued by this court a detailed affidavit-in-reply was filed on behalf of respondent Nos.5 to 10. However, no reply was filed on behalf of the AMC and, therefore, the matter was adjourned time and again and ultimately an affidavit-in-reply was filed on behalf of the AMC.

6. This matter is heard at length. Mr.P.M.Thakkar, learned Senior counsel appearing on behalf of the petitioners, Mr.Maulin Raval, learned advocate appearing on behalf of the respondent Nos.1 and 2, and Mr.A.C.Gandhi, learned advocate appearing on behalf of respondent Nos.5 to 10. Though served none appears on behalf of respondent Nos.3 and 4.

7. Mr.P.M.Thakkar, learned Senior Counsel appearing on behalf of the petitioners, has challenged sanctioning of the plan and commencement certificate issued by the AMC mainly on the ground that before sanctioning the plan and issuing the commencement certificate, the petitioners were not heard and there objections were not considered at all. He has further submitted that looking to the fact that the respondent Nos.5 to 10 are going to construct a cancer hospital the AMC should not have granted the permission to them for putting up construction of a hospital. He has further submitted that it is not in the interest of the persons who are residing in the Society and the nearby area to have the hospital. He has further submitted that without taking into consideration the fact that in the residential area the construction of a multistory hospital building cannot be permitted and sanctioning of the plan and the commencement certificate are even contrary to the order passed by the learned Chamber Judge, Court No.10, City Civil Court at Ahmedabad dated 16-12-2003 and, therefore, requested to allow the present petition by restraining the respondent Nos.5 to 10 from putting up any construction of hospital.

8. An affidavit-in-reply has been filed on behalf of respondent Nos.5 to 10 wherein it is submitted that the plot in question is not in the Society and is an independent plan and not connected in anyway with the

petitioner - Society. It is also further submitted that the plot purchased by them is an independent plot situated on 80 ft. vide road and as per the Municipal Bye-laws as well as the General Development Control Regulations (GDCR) issued by the Government of Gujarat, construction of nursing home, hospital, etc. is permissible on the said plot of land. It is also specifically denied that none of the alleged disease which will be cured in the proposed hospital will jeopardize the health of the members staying in the Society as alleged or otherwise. It is specifically submitted that none of the diseases are infectious as alleged. It is also further submitted that the permission is granted pursuant to the order passed by the City Civil Court at Ahmedabad dated 16-12-2003. It is also further submitted that there is a suppression of material fact on the part of the petitioners as they have deliberately not produced the order passed by the learned City Civil Court at Ahmedabad dated 22-04-2004 passed in Civil Suit No.2494 of 2003 in vacating the interim relief granted earlier. It is, therefore, submitted that the present petition is required to be dismissed on the ground of suppression of material fact. It is also further submitted that while passing the order dated 22-04-2004 a grievance made on behalf of the petitioners with regard to not hearing of the petitioners was also considered. It is also further submitted that in fact an Appeal from Order No.156 of 2004 was filed against the order dated 22-04-2004 but the same came to be withdrawn by the petitioners on 06-05-2004 and on the very day the present petition is filed. It is also further submitted that on the same road there is one another hospital 'Samved' is running but the petitioners have never objected to the same and for all the above reasons it is requested to dismiss the present petition.

9. In response to the notice issued by this Court Mr.Maulin Raval, learned advocate appearing on behalf of the respondents - Corporation. An affidavit-in-reply has been filed on behalf of the AMC wherein it is specifically stated that the petitioners were called for hearing on 23-02-2004 at 3:30 p.m. However, none of the petitioners or representative or anybody came for hearing on the said date or any other date. In fact, on 23-02-2004, someone on behalf of the petitioners submitted a representation to the Inward Clark and left. It is also further submitted in the said affidavit-in-reply that respondent No.1 once again wrote a letter on 30-04-2004 to the petitioners and replied to the allegations made by the petitioners that no opportunity was given to them. It is specifically

mentioned in the said affidavit-in-reply that the petitioners' representation has been considered and that the plans of the property in question was approved in accordance with the GDCR.

10. An affidavit-in-rejoinder has been filed to the affidavit-in-reply filed on behalf of respondent Corporation wherein the petitioners have come out with a case that the representative of the petitioners remained present in the Office of respondent No.1 on 23-02-2004 at 3:30 p.m. pursuant to the letter dated 10-02-2004 along with the relevant papers. However, on reaching the office of the Corporation it was found by them that the concerned officer was not available and had gone to Gandhinagar for some work. Having come to know this, the concerned person submitted the representation of the Society to the Inward Clark and left. It is also further submitted in the affidavit-in-rejoinder that the petitioner - Society has never received any letter dated 30-04-2004 addressed by the respondent - Corporation.

11. Heard the learned advocates appearing on behalf of the respective parties.

12. There is a material suppression on the part of the petitioners. Respondent Nos.5 to 10 are right in making a grievance that the petitioners have suppressed the material fact before this Court to the effect that they have not produced the order passed by the learned Chamber Judge, Court No.13 of City Civil Court, Ahmedabad dated 22-04-2004 in Civil Suit No.2294 of 2003 allowing the respondents to put up the construction. In fact, there is no reference whatsoever in the petition with regard to granting of the permission by the learned City Civil Court allowing respondent nos.5 to 10 in putting up a construction of hospital. Therefore, as such the petitioners are not entitled to any discretionary relief in a petition under Article 226 of the Constitution of India on this ground alone. It is also pertinent to note that the petitioners have also not stated anything in the petition which is said by them in the affidavit-in-rejoinder which is filed after the affidavit-in-reply was filed by respondent No.1. It is also not pointed out in the petition that the petitioners were in fact called to remain present on 23-02-2004 but the concerned officer has not present at the hearing and, therefore, they submitted a representation to the Inward Clark. On the contrary there is a grievance made that the objections submitted by the petitioners were not considered and an opportunity of hearing was not given to the petitioners at all, which was required to be given

pursuant to the order dated 16-12-2003 passed by the the learned Chamber Judge, Court No.10, City Civil Court at Ahmedabad by order dated 16-12-2003, below Notice of Motion at Exhs.6 and 7 in Civil Suit No.2687 of 2003.
It is also pertinent to note that even in the affidavit-in-rejoinder the petitioners have not stated that the Appeal from Order filed by the petitioners was withdrawn on 06-05-2004, the day on which the present petition has been filed. This shows the conduct on the part of the petitioners which disentitle the petitioners any relief in the present petition.

13. In spite of the aforesaid fact this Court has considered the fact of the petitioners on merits also. It is born out from the record that Civil Suits are pending between the parties in fact the very prayers which are sought for in the present petition were by and large subject of the said two civil suits pending in the City Civil Court at Ahmedabad. In fact the commencement certificate came to be issued by the AMC pursuant to the order passed by the learned City Civil Court at Ahmedabad on 16-12-2003. If the petitioners are aggrieved by the commencement certificate on the ground that the directions issued by the learned City Civil Court at Ahmedabad vide order dated 16-12-2003 are not complied with then proper remedy of the petitioners would have to approach the City Civil Court, Ahmedabad and to amend the suit but in stead of that the present petition has been filed. In fact the aforesaid aspect was pointed out before the learned City Civil Court, Ahmedabad when the order came to be passed on 22-04-2004. In fact, the learned Chamber Judge, Court No.13 of City Civil Court, Ahmedabad had categorically stated in his order dated 22-04-2004 that in the meanwhile, the plaintiff may move an application as intended by him for amendment in the plaint. This was observed because of the fact that the learned advocate appearing on behalf of the plaintiffs have stated that they want to challenge the permission, and now instead of moving an application for amendment in the plaint, the present petition has been filed. Under these circumstances, the present petition is required to be dismissed.

14. Emphasis on the part of the petitioners is that by order dated 16-12-2003 the learned City Civil Court at Ahmedabad has directed the AMC to take up the process of plan as per the provisions of the B.P.M.C. Act and rules and regulations and after hearing the parties. It is submitted on behalf of the petitioners that as before granting the commencement certificate the petitioners were not heard, the commencement certificate is required

to be quashed and set aside. It is required to be noted that the learned City Civil Court at Ahmedabad in its order dated 16-12-2003 directed the AMC to take up the process of plan as per the provisions of the B.P.M.C. Act and the rules and regulations made thereunder without being influenced by pendency of aforesaid both the suits and injunction order passed in C.S. No.2494/2003 and after hearing the parties as required under the provisions of the B.P.M.C. Act and the rules and regulations made thereunder. What was required to be done by the AMC was to process the plan after hearing the parties as required under the provisions of the BPMC Act and the rules and regulations made thereunder. It is submitted on behalf of the respondents that under the provisions of BPMC Act and the rules and regulations made thereunder there is no provisions for hearing the parties. The petitioners have also not pointed out any provision by which hearing was required to be given to them. Under the circumstances, the arguments on behalf of the petitioners that as they were not personally heard, commencement certificate is bad in law and has no substance whatsoever.

15. In fact considering the affidavit-in-reply filed on behalf of the AMC, it is found that the representations submitted by the petitioners were considered and thereafter commencement certificate was given. In fact, when it is pointed out in the affidavit-in-reply that by communication dated 10-02-2004 the petitioners were directed to remain present on 23-02-2004 at 3:30 p.m. nobody remained present and one representation was given to the Inward Clark, the petitioners have now come out with the case in the affidavit-in-rejoinder that in fact representative went there but concerned officer was not available and had gone to Gandhinagar for some work. It seems that the same is an afterthought. As stated above, in the present petition there is no mention whatsoever with regard to the communication dated 10-02-2004 directing the petitioners and/or their representative to remain present on 23-02-2004 and that the representative had gone there on 23-02-2004 and the officer was not present. Therefore, the submission on behalf of the respondent Corporation that nobody remained present on behalf of the petitioners on 23-02-2004 at 3:30 p.m. pursuant to the communication dated 10-02-2004 is required to be accepted and it is to be held that the opportunity in fact was given to the petitioners and/or representative to put forward their case but they have not availed of the same deliberately and, therefore, now it is not open for the petitioners to make a grievance that the opportunity was

not given to them.

16. As per GDCR issued by the Government of Gujarat construction of nursing home, hospital, etc. is permissible in the residential area. Even on the vary road there is a big hospital named 'Samved' and the petitioners have never objected to it. There is nothing on record to show that the respondent Nos.5 to 10 are likely to treat only those patients who are suffering from cancer and/or aids. It was not the case of the petitioners before the trial Court and in fact cancer is not infectious. The AMC has considered all the aforesaid aspects while granting commencement certificate.

17. So far as other grievance made by the petitioners with regard to causing nuisance, inconvenience to the members of the Society and granting of permission in residential area and granting of the commencement certificate/permission without prior approval of the Society is concerned, the same are the subject matter of the suit and, therefore, this Court is not considering the same on merits, otherwise if any observations are made the same is likely to effect either parties in the suit. Further grievance in the present petition is that the objections submitted by the petitioners were not considered and the petitioners were not heard. However, considering the aforesaid facts and circumstances of the case and the observations made hereinabove, the objections submitted by the petitioners are considered and thereafter commencement certificate is issued in accordance with the Rules and Regulations under the BPMC Act as well as GDCR. It is also pertinent to note that even there is no mention with regard to submission of representations / objections by the petitioners on 23-02-2004 in the petition.

18. For the reasons stated above, it cannot be said that the commencement certificate issued by the AMC is in any way erroneous and/or contrary to the order passed by the learned Chamber Judge, Court No.10, City Civil Court at Ahmedabad dated 16-12-2003 in Civil Suit No.2687 of 2003. Even as stated above, looking to the conduct and suppression of material facts, the petitioners are not entitled to any relief in the present petition. I find no substance in the present petition and, therefore, the same requires to be rejected and accordingly it is rejected. Rule discharged. No order as to costs. Interim relief, if any, stands vacated forthwith.

Sd/-

[M.R.SHAH, J]

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